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Supreme Court of the United States

October Term, 1959

No. [redacted] 437

NATIONAL AIRLINES, INC.,
Original Petitioner

versus

BERYL WHITEMAN STILES,
Opponent and Cross-Petitioner

OPPOSITION TO, AND CROSS-PETITION FOR, CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 378

NATIONAL AIRLINES, INC.,
Original Petitioner

versus

BERYL WHITEMAN STILES,
Opponent and Cross-Petitioner

OPPOSITION TO, AND CROSS-PETITION FOR, CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Beryl Whiteman Stiles opposes the petition of National Airlines, Inc. for *certiorari* to the Court of Appeals for the Fifth Circuit; and prays that *certiorari* be granted, limited to the question presented in this petition.

OPINIONS BELOW and JURISDICTION

This is an admiralty case. The issues of liability and damages were tried separately in the district court. That court's opinion on liability is reported at 161 Fed. Supp. 125. The district court rendered no opinion on the issue of damages.

No appeal was taken from the district court's judgment of liability. The opinion of the court of appeals on the issue of damages, which is printed in the appendix hereto, is reported at 268 F2d 400.

The court of appeals rendered its judgment on June 12, 1959. The time for filing this petition was, on August 10, 1959, extended by Mr. Justice Stewart to October 10, 1959. Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

The question presented by this petition is:

> May a district court base its reduced award of the "pecuniary loss" sustained by a surviving widow under the Wrongful-Death-on-the-High-Seas Act, in part on "speculative elements", or is the court required to compute the "pecuniary loss" under that statute, on the increased amount shown to be due by the concrete actuarial data—the only evidence as to such loss—in the record?

The holding by the court of appeals in this case, that speculative assumptions may be taken into consideration in awarding damages, appears to be contrary to the rules governing damages in federal statutory death and personal-injury actions, established by the decisions of this court.

STATUTE INVOLVED

Death-on-the-High-Seas Act
(41 Stat. 537, 46 USC 761, 762)

"Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative . . ."

"The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . ."

STATEMENT OF THE CASE

Mrs. Stiles filed this action in admiralty under the Death-on-the-High-Seas Act (46 USC 761 *et seq.*), to recover damages for her husband's death in the crash, on February 14, 1953, of a National Airlines plane in the Gulf of Mexico.

The district judge found—largely on the testimony of National's own personnel—that the fatal crash, in which 46 people were killed, was caused by the Airline's flagrant negligence in dispatching the flight, improperly manned and not airworthy, without warning, into the heart of a tropical storm "of the highest degree of severe turbulence, of which respondent had ample warning, and into which it should not have permitted Flight 470 to enter".*

The district court made no findings of fact on the issue of damages. The pertinent facts on this issue appear from the uncontradicted testimony of Mrs. Stiles' witnesses, since the Airline offered no evidence whatever on damages.

As pointed out in the *Argument* hereunder, the quantum of damages, in an action under the Death-on-the-High-Seas Act, is the survivor's "pecuniary loss"—the *aggregate amount of which* the survivor was deprived by the wrongful death, discounted at a conservative rate of interest to the date of death.

The principal factors for consideration in this regard, are the life expectancies of the decedent and survivor, the projected net earnings of the decedent over the remainder of his life expectancy, the amount of those earnings which would have inured to the survivor by

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Stiles vs National Airlines, 161 FS 125, 130, 1958 AMC 1158, 1958 USCAvR 1. The United States Weather Bureau officially defines "severe turbulence" as: "Rare. Usually impossible to control aircraft. May cause structural damage." 161 FS at 126.

contribution and inheritance, and the interest rate on conservative investments prevailing at the time of death.

Mr. Stiles died at the age of 51, and his life expectancy was accordingly 20.2 years (*Louisiana Revised Statutes*, 47:2405). His health, and that of Mrs. Stiles, were good, and neither suffered from any condition which might have shortened their life expectancies (*Libelant's Exhibit C*;* *R 37; R 25-26, 34*).

When he died, Mr. Stiles was earning $41,800 annually (the average of his earnings for the five years preceding his death) from his law practice. (*R 45*).

His business and personal expenses averaged about $17,000 (*R 35-36, 44*), and this sum, as it may have increased had Mr. Stiles not been killed, is the sole permissible deduction from income for purposes of computing damages.

Had Mr. Stiles lived, his income from his firm would, in the years 1952-1957, have increased to over $70,000 per annum; and would in all probability have continued to increase throughout his projected life expectancy (*R 46-47, 71-72*).†

The district court awarded damages of $250,000, with interest from the date of the crash. On appeal by both

* All exhibits have been transmitted to this court in original form.

† This latter evidence is confirmed by studies which have been made of this question. See Segal, *A New Look: The Economics of the Profession*, 43 American Bar Association Journal 789, 855 (1957).

parties, the judgment was affirmed by the court of appeals.

The Airline petitioned for *certiorari* to review the judgment; and this opposition thereto and cross-petition for *certiorari*, are filed in Mrs. Stiles' behalf.

ARGUMENT

In Opposition to the Airline's Petition

I

The Airline's petition for *certiorari* first presents the question whether, in an action in admiralty under the Death-on-the-High-Seas Act, interest on the damages awarded may be allowed for a period prior to the date of "the decree awarding damages".

The Airline contends that the affirmative holding by the court of appeals conflicts with the decisions of other courts, and that the case is therefore appropriate for review by this court to resolve the conflict.

It is the position of Mrs. Stiles that no real conflict in decisions on this point exists, and that the holding of the court of appeals is both plainly correct, and in accord with applicable precedent.

With two exceptions, the cases cited by the Airline as establishing a conflict of decisions, are common-law cases, which apply the usual rule that common-law

courts do not allow interest on tort claims, in the absence of express statutory authority.[1]

Even at common law, this rule has, in recent times, been subject to rapid erosion for lack of any rational foundation. It has been pointed out that the rule arose from "the theory that no debt was due prior (to judgment) or that interest was a part of the damages and was merged therewith in the amount awarded".[2]

In fact, the debt arises with the cause of action; and when damages are computed as of the date of the tort, any remaining reason for not allowing interest from that date disappears.

In the words of one commentator on the common-law rule: "Originally, the courts seem to have started out with the general rule that interest cannot be recovered on unliquidated damages; and although the courts still continue to pay lip service to this rule, the tendency of practically all the modern cases is to allow interest whenever justice and equity require its allowance.[3] In other words, the great weight of authority, as expressed

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[1] "Under the common law, judgments do not bear interest." 30 Am. Jur. 22, "Interest", section 24. See also 3 Frumer and Benoit, *Personal Injury* 48, "Damages", section 3.04(8). The historical background of the common law's hostility to interest, which was founded in early religious thinking, is traced in McCormick; *Interest as Damages*, 9 North Carolina Law Review 237, 238-42 (1931).

[2] *Louisiana & Arkansas Ry. Co. vs Pratt*, 142 F2d 847, 848 (CA 5-1944).

[3] Accord: 3 Frumer and Benoit, *Personal Injury* 48-49, "Damages", section 3.04(8); 15 Am. Jur. 579-81, 586-88, "Damages", sections 161, 169-71; 16 Am. Jur. 250, "Death", section 384; 25 Corpus Juris Secundum 540-43, 1261, "Damages", section 53, "Death", section 109.

in the more recent and better-reasoned cases, is to the effect that full compensation for damage to or destruction of property requires that, even in the case of unliquidated demands, account be taken of the period that elapsed between the damage and the award, and that allowance be made for this period in the form of interest or its equivalent."[4]

This court gave recognition to this trend to allow interest on unliquidated judgments, as long ago as 1933. Chief Justice Hughes pointed out that "it has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one. Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. Because of this fact, the rule with respect to unliquidated damages has been in evolution . . . and in the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practicality."[5]

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[4] Anno., 36 ALR2d 337, 345. See *Bruce vs State*, 1 Misc.2d 104, 146 NYS2d 767 (NY Ct.Cl.-1955), aff'd, 3 App. Div.2d 793, 160 NYS2d 404.

[5] *Funkhouser vs Preston Co.*, 290 US 163, 168-69 (1933). Accord: *Miller vs Robertson*, 266 US 243, 257-58 (1924): When the right to unliquidated damages has fully accrued as of a given date, "payment . . . later . . . is not full compensation" without an interest award; and "one who has had the use of money owing to another, justly may be required to pay interest from the time the payment should have been made".

McCormick agrees that "the marked tendency today is toward the allowance of interest" on unliquidated claims for pecuniary loss; and he points out that while "the decisions are in conflict" as to death claims, "interest from the time of death should be within the jury's discretion" when the claim is for pecuniary loss, as it is under the Death-on-the-High-Seas Act.[6]

The Airline cites only two admiralty cases on this question. In *Sabine Towing Co. vs Brennan*, the Court of Appeals for the Fifth Circuit recognized that "in admiralty the allowance of interest is discretionary with the court", but held that interest in that case should be allowed only from the date of judgment, without, however, giving the grounds for this holding.[7] The decision obviously does not conflict in principle with the same court's holding in the case at bar.

The Airline's only other admiralty authority, *Cleveland Tankers vs Tierney*,[8] would appear to be, in its flat holding that interest cannot be allowed prior to the date of judgment, at variance with the established admiralty rule that interest in admiralty lies within the discretion of the trial court;[9] and that "the date from which it is allowed in admiralty cases has uniformly been from the date of the loss unless for good reasons it was determined otherwise".[10]

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[6] *Handbook on the Law of Damages* (1935), 222, 225.

[7] 85 F2d 478, 484 (CA 5-1936), cert. den., 299 US 599.

[8] 169 F2d 622 (CA 6-1948).

[9] *The Maggie J. Smith*, 123 US 349 (1887); *O'Donnell Transp. Co. vs City of New York*, 215 F2d 92 (CA 2-1954).

[10] *Geotechnical Corp. vs. Pure Oil Co.*, 214 F2d 476, 477-78 (CA 5-1954). In the following admiralty cases, interest was allowed prior to judgment on death and personal-injury

Further, as pointed out by the court of appeals in its opinion in this case, Jones Act decisions disallowing pre-judgment interest would not seem necessarily relevant to the interest question under the Death-on-the-High-Seas Act, inasmuch as Jones Act suits may be filed for personal injuries (in which case, recovery may be based on "pain and suffering and injuries up to the date of trial and as to the future") as well as death, and may be brought either in admiralty or on the civil side.

It is understandable that Congress and the courts might deem it best to apply the uniform common-law interest rule in all Jones Act cases, to avoid conflicting bases of recovery in different courts, and to avoid confusing the jury in personal-injury actions.

In a death action, on the other hand, damages are fixed as of the date of death, and no possible confusion can result from allowance of interest from that date.[11]

Actions under the Death-on-the-High-Seas Act lie only in admiralty,[12] so that no conflict can arise from applying the admiralty interest rule in such actions.

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claims: *Thompson Towing & Wrecking Ass'n vs McGregor*, 207 Fed. 209 (CA 6-1913); *Union Steamboat Co. vs Chaffin's Administrators*, 204 Fed. 412 (CA 7-1913), cert. den., 229 US 620; *The Linseed King*, 48 F2d 311 (SD NY-1930), aff'd, 52 F2d 129, rev'd on other grounds, 285 US 502. See also *Chicago, D. & G. B. Transit Co. vs Moore*, 259 Fed. 490 (CA 6-1919), cert. den., 251 US 553.

[11] "Here . . . the (district) court made plain its finding that the award was a fair measure of Mrs. Stiles' pecuniary loss as of the date of her husband's death, and interest on the amount was awarded to make her recovery complete." Opinion of the court of appeals in this case, *post*, pp. 25-26.

[12] *Trihey vs Transocean Air Lines*, 255 F2d 824 (CA 9-1958), cert. den., 358 US 838; *Noel vs Linea Aeropostal Venezolana*, 247 F2d 677 (CA 2-1957), cert. den., 355 US 907.

It thus appears that the holding herein as to interest is not in conflict with any other applicable precedent; and that the court of appeals was clearly right in holding that Congress, in creating a death action exclusively in admiralty, for "the pecuniary loss sustained", obviously intended the action "to be governed by the traditional admiralty conception of interest as an element" of the survivor's "pecuniary loss".[13]

II

The second question raised by the Airline is whether the measure of damages under the Death-on-the-High-Seas Act, is to be determined by reference to the law of the state in which the decedent was domiciled, or by reference to federal principles of uniform application.

This question is illusory in this case, for the result is the same whether or not state law is used as the standard.

Mrs. Stiles is both her husband's surviving widow and his sole heir. The court of appeals held that the district court, in fixing damages, had the right to take into account Mrs. Stiles' community-property interest in one-half of the future net retained earnings which her husband would have realized had he lived. This is the holding of which the Airline complains.

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[13] This reasoning is in accord with the same court's holding, in *Louisiana & Arkansas Ry. Co. vs Pratt*, 142 F2d 847, that in creating an action at common law under the Federal Employers' Liability Act, Congress intended that action to be subject to the common-law rule denying interest before judgment.

But the court of appeals also held that the district court had the right to take into account Mrs. Stiles' interest, as her husband's sole heir, in the entirety of the net retained earnings which her husband would have realized had he lived, and which she would have received by inheritance at his death.

This holding—which absorbs the holding as to the community-property interest—is in full accord with federal precedent,[14] and does not conflict with the decisions cited on pages 5 and 6 of the Airline's petition.[15]

For these reasons, it does not appear that the Airline's petition raises any question requiring resolution by this court.

In Support of the Cross-Petition for Certiorari

Damages under the Death-on-the-High-Seas Act "shall be a fair and just compensation for the pecuniary loss sustained" by the survivor.[16]

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[14] See *Railroad Co. vs Barron*, 5 Wall. 90 (1866); *Martin vs Atlantic Coast Line R.R.*, 268 F2d 397 (CA 5-1959); *O'Toole vs United States*, 242 F2d 308 (CA 3-1957), and authorities cited therein.

[15] *The Black Gull*, 90 F2d 619, was a suit by the decedent's legally-separated wife. No expectation of inheritance was involved. *Middleton vs Luckenbach S.S. Co.*, 70 F2d 326, concerned the death of a fisherman who had evidently saved none of his earnings, since no claim of expected inheritance was made by the parties or discussed by the court.

[16] 46 USC 762.

This loss is to be measured by what the person suing would have received, if the decedent had lived out his normal life expectancy with normal consequences.[17]

Under wrongful death statutes generally, and under the Death-on-the-High-Seas Act in particular, the surviving widow may accordingly claim the amount of money which she would normally have received during the decedent's life expectancy, by way of contribution and inheritance, discounted, at a conservative rate of interest, to value at date of his death, with interest on such value from the date of death.

The principal determining factors are the decedent's earnings at the time of his death, any probable increase in such earnings which can be shown, and the decedent's usual expenditures, other, of course, than contributions to his survivor.

No consideration is to be given to amounts received by the survivor by pension or other collateral payment or inheritance, or to income taxes the decedent would have paid had he lived.[18]

On the basis of these principles, the low amount of the district court's award cannot be reconciled with the uncontested facts of record in this case.

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[17] *Cf. The Black Gull*, 90 F2d 619, 620-21 (CA 2-1936), cert. den., 302 US 728: "The damages to be awarded shall be gauged by the reasonable expectation of pecuniary benefits which would have flowed from the continued life of the deceased."

[18] *Chesapeake & Ohio Ry. Co. vs Kelly*, 241 US 485, 490-91 (1916); *Gulf, C. & S. F. Ry. Co. vs Moser*, 275 US 133 (1927); *Railroad Co. vs. Barron*, 5 Wall. 90 (1866); *O'Toole vs United States*, 242 F2d 308 (CA 3-1957); *Hudson vs Lazarus*, 217 F2d 344 (CA DC-1954); *Stokes vs United*

Libelant contended below for an award based on projected annual earnings, for the duration of Mr. Stiles' life expectancy, of $70,000—proven mathematically to be the share of his firm's current earnings to which Mr. Stiles would have been entitled were he alive today—independently of his probable contributions to the firm's business, and his own services to it.

So far from being in an amount based on this figure, however, the award of the district court is even less than the amount arrived at by computing damages on the basis of the $41,800 per annum which Mr. Stiles was actually earning at the time of his death.[19]

The court of appeals recognized the lack of any tangible basis in the record for the district court's award; but nevertheless rejected Mrs. Stiles' appeal on the ground that, in arriving at the amount of its judgment, the district court had the right to take into consideration such purely "speculative elements" as the possibility that Mr. Stiles' earnings might have decreased (the record affirmatively estab ishes a mathematically-dem-

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States, 144 F2d 82 (CA 2-1944); *Briscoe vs United States*, 65 F2d 404 (CA 2-1933); *Drowne vs Great Lakes Transit Corp.*, 5 F2d 58 (CA 2-1925); *Brabham vs B. & O. R. Co.*, 220 Fed. 35 (CA 4-1914); *Walker vs United States*, 102 FS 618 (SD NY-1952), aff'd *per curiam*, 194 F2d 288 (CA 2-1952); *The City of Rome*, 48 F2d 333, 338 (SD NY-1930); *Sutherland on Damages* (4th ed.), sections 1263, 1265, 1268-71; Oleck, *Damages to Persons and Property* (1955), section 198; *Restatement of the Law, Torts*, section 920, comment (*e*); 3 Frumer and Benoit, *Personal Injury* 305-306, 320, "Death Actions", sections 3.05, 3.16.

[19] For the convenience of the court, the appendix hereto contains alternative computations of damages based on annual earnings of $70,000 and $41,800.

onstrated substantial increase in his projected earnings since the date of his death, *R 46-47*); that he might have retired from the practice of law (the record shows that he was an active, energetic and successful practitioner, *R 67*, and it is well known, and established by actual studies, that successful lawyers seldom retire, if at all, before an advanced age—see article cited in footnote † on page 5, *supra*); that Mrs. Stiles might not have survived her husband (the record affirmatively shows that she was younger than her husband, and was in good health at the time of his death, *R 26, 34, Libelant's Exhibits C and D*, and it is accepted that the majority of women survive their husbands); or that Mr. Stiles might, in some aberrative mood, have decided to will his property to another (the record affirmatively shows that Mrs. Stiles was her husband's sole heir, *Libelant's Exhibit E)*.

It would appear that this holding by the court of appeals under the Death-on-the-High-Seas Act, is irreconcilable with the rule, established by this court's decisions in death actions generally, that the amount of damages must be calculated from facts, or permissible inferences from facts, of record, not from speculative hypotheses actually negatived by all of the evidence.[20]

[20] See *Boston & Albany Railroad vs O'Reilly*, 158 US 334 (1895); *Richmond & Danville Railroad vs Elliott*, 149 US 266 (1893). See also *Swift & Co. vs Johnson*, 138 Fed. 867 (CA 8-1905), per Van Devanter, Circuit Justice. None of this court's decisions cited in footnote 5 to the opinion of the court of appeals in this case, stands for the proposition for which they are cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition of National Airlines, Inc. for *certiorari* should be denied; and that *certiorari* should be granted, limited to the question presented in this petition.

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September, 1959

APPENDIX

APPENDIX

Judgment of the District Court

This cause came on for trial on August 4, 1958, on the issue of damages only, and was duly tried, argued and submitted, and the Court took time to consider.

Now, therefore, after due consideration,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Libelant, BERYL WHITEMAN STILES, and against the respondent, NATIONAL AIRLINES, in the full sum of Two Hundred Fifty Thousand Dollars ($250,000.00) with interest at the rate of 5% per annum from February 14, 1953, until paid, and costs.

Opinion of the Court of Appeals and Dissenting Opinion

TUTTLE, Circuit Judge: This is an appeal by National Airlines from a judgment awarded Mrs. Stiles in the sum of $250,000 plus interest from the date of her husband's death in an airplane crash as being excessive as a matter of law, and a cross appeal by the wife on the ground that the record facts demanded, as a matter of law, a substantially greater judgment.

Harry Stiles was a successful New Orleans lawyer whose income from his law partnership averaged $41,800.00 per year at the time of his death. He lost his life when an airliner of the appellant's fleet was lost

under circumstances held by the trial court to be negligent. See *Stiles v. National Airlines*, 161 F. Supp. 125. The holding as to liability is not appealed.

At the time of his death Stiles was 51 years of age. He had a life expectancy of 20.2 years. His wife was younger, and she thus had a longer expectancy.

The action was brought under the Death on the High Seas Act, 46 U.S.C.A. 761,[1] which has been held to cover death resulting from air accidents over the high seas, *Trihey v. Transocean Air Lines*, 9 Cir., 255 F. 2d 824. It will be noted that the recovery in such a case is expressed as "a fair and just compensation for the pecuniary loss sustained." 46 U.S.C.A. 762.[2]

There are two distinct issues presented on this appeal. (1) Did the trial court err as a matter of law in awarding the judgment of $250,000, either because the largely undisputed testimony demanded either a larger or smaller award? (2) Was it legally permis-

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[1] "§761. Right of action: where and by whom brought.
Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

[2] "762. Amount and apportionment of recovery.
The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."

sible for the trial court to make an award of interest to run between the date of death and the date of judgment?

We affirm the trial court's judgment on both counts. The trial court considered the question of damages entirely on depositions. Although numerous objections were noted as to the relevance of certain evidence, none was passed on by the trial court on the trial and we consider that there is no question before us as to the propriety of the trial court's considering all of the evidence which had probative value in arriving at its decision.

As to the first question, the dispute is sharply drawn by counsel's respective contentions. The defendant airline says the evidence was clear that at the time of her husband's death Mrs. Stiles was not actually receiving in cash or dollar value for her own exclusive use more than $7246.00 per year. (It makes a different computation of $6746.00 as an alternative figure.) It says that if the court found that the husband would remain gainfully employed for the rest of his expectancy and could and would continue "to contribute the same annual amount to the defendant *for the latter's sole benefit*," (emphasis added) the court was required to limit the award to a sum representing this annual contribution for 20.2 years reduced to a present cash value. This figure, it says, could not exceed $108,599.78 if figured at a 3% rate of return, or $99,131.65 at a 4% rate, which it claims should be used.

The plaintiff, on the other hand, says that the record is clear that a maximum of only $17,000 was spent on the average by the husband for business expenses and personal items, leaving $24,800 which is the amount of her annual loss, either because she should share this amount with him during life or it would accumulate and she would receive it on his death. Thus, she says, this sum should be multiplied by 20.2 and discounted at the present cash value. This computation would produce $347,000, using a 3% rate or $339,264, if discounted at 4%. Mrs. Stiles contended further that the opinion evidence (undisputed in the record) that Mr. Stiles's law practice income would have averaged $70,000 per annum had he lived, would increase this amount to a mathematical and legal certainty to $622,685.00.[3]

Thus, the defendant claims that the "pecuniary loss sustained" by the wife of a 51 year old lawyer whose earnings at time of death averaged $41,800 and would have by the date of trial four years later, been in excess of $70,000 must be restricted to the present cash value of the relatively small amount which he currently gave her as a cash allowance or which she received for her sole benefit for household and like expenditures, plus half of an item of $3500 estimated by her to be spent by her husband for their clothing, contributions and miscellaneous expenses.

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[3] She also contended that to whatever sum was thus determined she was entitled as a matter of law to an additional $50,000 representing the pecuniary value of the "loss of Mr. Stile's care and advice." It is so patent that on this record no legal issue can be raised as to this sum that it is not further referred to.

Such a contention would deprive the trial court of the right to give any effect to the community property laws of the state of Louisiana which have the effect of declaring that one half of the husband's current income belongs to the wife. See *Bender v. Pfaff*, 282 U.S. 127; Succession of Wiener, 203 La. 649; 14 So. 2d 475. It would also deprive the trial court of the right to consider that if Mr. Stiles increased his income he might increase Mrs. Stiles's personal pecuniary enjoyment in such increase either by increasing payments actually made to her, or by expenditures made by him for the benefit of both or by accumulations of excess income over current expenditures. It would, of course, deprive the trial court of the right to consider that such accumulation, both as to her one-half under community property rules, and also of his part as well, might ultimately be inherited by the wife.

The airline especially criticizes the theory that the possibility of an inheritance by Mrs. Stiles of any accumulations during the period of his expectancy may be considered by the trial court as an element in determining the pecuniary loss sustained. Ordinary common sense, it seems to us, would refute this contention. It is as likely that a wife in these circumstances, who did in fact inherit her husband's entire estate on his untimely death, would continue to be the natural object of his affection and beneficence if he lived out his expectancy and made substantial additional accumulations as that he would continue to give her the kind of support the defendant admits the court could assume would continue. No authoritative decision has been

called to our attention and we have found none that holds such consideration to be inappropriate in such an inquiry. We have held in a decision announced today in *Martin v. Atlantic Coast Line* R.R., 5 Cir., 268 F. 2d 397, an FELA case, that on principle that is a proper element to be considered by the trial court in assessing damages. Cf. *O'Toole v. United States*, 3 Cir., 242 F. 2d 308.[4]

Having determined that the likelihood of future earnings, the likelihood of the wife's pecuniary enjoyment of her part of them, and the likelihood that she would also have benefited by her husband's own accumulations of his half of the community income either during life or as his heir or legatee were all properly before the court, it is plain, we think, that we cannot hold on this record that an award of $250,000 was, by law, excessive.

It does not follow, however, that the particular amount of the judgment was demanded by the evidence. Nor, a fortiori, can it be held that a larger sum was, by law, demanded. It is impossible to tell exactly how the trial court arrived at the figure it determined. It is plain, however, that it could consider, but not be bound by, the life expectancy of the decedent, evidence as to the rate of interest to be applied for arriving at a present value; the possibility of Mr. Stiles continu-

[4] Both the FELA and the Death on the High Seas Act are "Lord Campbell Acts," Van Beeck v. Sabine Towing Co., 300 U.S. 342, 346, and are subject to the same measure of damages. Michigan Cent. R.R. v. Vreeland, 227 U.S. 59; Middleton v. Luckenbach S.S. Co., 2 Cir., 70 F. 2d 326, cert. denied, 293 U.S. 577.

ing to practice his profession at an ascending scale financially, or the reverse; the possibility that, with ample other means which appeared from the evidence, and no family other than his wife, he might be content to take an early retirement. There was also the possibility that the wife might not outlive her husband, notwithstanding her younger age, or that he would in fact leave his inheritance by will to his sister or to charity. All of these elements, speculative as they are, the court had the right to consider.[5]

As we have indicated, the trial court did not, in its judgment, make specific mathematical calculations from which it is possible to ascertain which of these circumstances weighed most heavily in its determination of the amount. It is not required to do so, *Robey v. Sun Record Co.*, 5 Cir., 242 F. 2d 684. Mrs. Stiles's request that we compute a larger sum and enter a judgment for it does not fall within the powers of this Court, for it is the trial court, not we, which has this function to perform. See *Sanders v. Leech*, 5 Cir., 158 F. 2d 486. On the record before us the trial court could give such weight as it thought appropriate to the many circumstances before it. The parties did not seek by motion below to isolate those parts of the evidence which they now insist could not legally be considered by the trial court.

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[5] See Louisville & N. R.R. v. Holloway, 246 U.S. 528; Chesapeake & O. Ry. v. Kelly, 241 U.S. 485; Baltimore & Potomac R.R. v. Mackey, 157 U.S. 72, 93; Michigan Cent. R.R. v. Barron, 5 Wall. (72 U.S.) 90, 106; Illinois Cent. Ry. v. Spence, 93 Tenn. 173, 23 S.W. 211, 215.

We repeat what we said in *Sanders v. Leech*, *supra*, at page 488:

> "In these circumstances it is not our duty to determine whether, if we were triers, we would have awarded damages in the same, a greater, or a lesser amount. It is our duty to determine only whether we can say that the amount awarded was so inadequate that it was clearly erroneous, that is unjust. The evidence furnishes no basis for determination that it was."

We turn next to the propriety of the court's allowing interest from the date of the negligent death. The argument runs: This is a new right created by statute; the statute does not in express terms provide for the allowance of interest; hence interest cannot be allowed.

The statute states two things plainly: (1) The recovery is to be for "a fair and just compensation for the pecuniary loss sustained," and (2) the right of action is in admiralty.

Logically and sensibly, if the pecuniary loss to Mrs. Stiles for the death of her husband is $250,000, based on an expectancy of 20.2 years from the date of his death, she will not receive full value for her pecuniary loss if she does not receive the award until after judgment four and one-half years later. Although the statement was made in connection with a property loss, the following language aptly expresses the correct thought:

> ". . . Damage is sustained as of a certain date. What the damage is may not be and is

> not affected by the time when estimated, but the damage is as found, and an award made on one date is not the equivalent of an award made at an earlier date. The delay thus enters into the late award as an element of loss, and the damage awarded is for a sum which is the equivalent of what would have been a smaller sum if earlier awarded . . . ." The Manhattan, 3 Cir., 85 F. 2d 427, 429, cert. denied 300 U.S. 654.

This is simply the doctrine of *restitutio in integrum*, long a leadi g maxim applied by admiralty courts. The President Madison, 9 Cir., 91 F. 2d 835, 845-47. It is quite obvious that a party suffering a financial loss from the death of a bread winner, just as from the destruction of a ship, can be placed in the same po tion as he previously enjoyed only if the award is made at the time of the loss or if interest for the time between loss and payment is allowed.

We find no federal case arising under this statute which expressly decides whether interest from the date of death may be added in order to provide fair and just compensation. It is quite clear that with as many uncertain factors as there are for consideration by the court, in arriving at the fair value of plaintiff's pecuniary loss the length of time to the date of judgment may sometimes be taken into consideration by the court in determining the amount of its award. In such a case the court should not, of course, allow interest on such amount. Here, however, the court made plain its finding that the award was a fair measure of Mrs.

Stiles's pecuniary loss as of the date of her husband's death, and interest on the amount was awarded to make her recovery complete.

Interest from the date of loss has long been allowed, of course, in admiralty for property loss. The Natchez, 5 Cir., 78 Fed. 183; *Geotechnical Corp. of Delaware v. Pure Oil Co.*, 5 Cir., 214 F. 2d 476. The allowance of such interest is the rule except for good cause shown. Admiralty thus stands on a different footing from the common law in this respect, for the general rule in common law had traditionally been that pre-judgment interest could not be allowed on an unliquidated tort claim. See for a discussion of this distinction, *Moore-McCormack Lines v. Amirault*, 1 Cir., 202 F. 2d 893, and see for a discussion of the more modern trend, even in common law actions, the note in 36 A.L.R. 2d, 343, where at 345 it is said:

> "Where the damages are of a pecuniary character and are measurable in money with reasonable certainty, the trend of modern decisions seems to be to allow interest as a matter of right. Thus, generally speaking, interest is allowable as a matter of right in actions of trover, trespass, or replevin, and in condemnation proceedings. . . . According to most cases whenever interest is allowed as a part of the damages, it runs from the date of the injury to, or detention, loss, or destruction of, the property involved."

Lacking any federal decisions under this act, the airline relies heavily on a New York State decision

which applied the Death on the High Seas Act in state litigation. In *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420, aff'd. 267 App. Div. 947, 48 N.Y.S. 2d 459, aff'd. 293 N.Y. 878, 59 N.E. 2d 785, cert. denied 324 U.S. 882, the New York court held: "As the said statute contains no provision for interest, it follows that interest may not be allowed on the verdict here . . . ."

Appellant also relies on the federal cases decided under the Jones Act, 46 U.S.C.A. 688, and the Federal Employers' Liability Act, 45 U.S.C.A. 51. 60. Typical of these are *Chicago M. St. P. & P. RR. v. Busby*, 8 Cir., 41 F. 2d 617, and *Cortes v. Baltimore Insular Line*, 2 Cir., 66 F. 2d 526, holding that judgments under these statutes cannot include interest for the period preceding judgment. There is also the case from this circuit which holds the allowance of interest is discretionary in admiralty, and disallowed it. *Sabine Towing Co. v. Brennan*; 5 Cir., 85 F. 2d 478, a Jones Act case tried in admiralty.

With deference to the New York court, we conclude that the language of the statute here for construction clearly allows interest from the date of death as an element necessary to provide "fair and just compensation for the pecuniary loss incurred," where the trial court clearly showed that no such increment was included in the principal award. The Jones Act and FELA cases are clearly distinguishable because in each of them Congress created a cause of action *at law* (though the Jones Act plaintiff may elect to sue in admiralty).

which, moreover, comprehends the right of the plaintiff to recover for pain and suffering and injuries up to the date of trial and as to the future. It is quite understandable that Congress may have enacted these statutes in light of the common law rule on interest because where the injuries and consequences of injuries continue up to the date of trial and beyond it would be much easier to figure damages as of the date of trial. This would not be so in the case of a simple death statute, where the entire loss occurs at one time and is measured as of that time.[6] It is also understandable that the court would apply the same rule as to interest under the Jones Act, whether the particular suit was for death or for injury and pain and suffering and whether the suit was brought in admiralty or on the law side of the court. On the other hand, it is equally understandable that when Congress created a right of action for "pecuniary loss" for death only and created it as solely an admiralty action it intended for it to be governed by the traditional admiralty conception of interest as an element of the loss suffered by the claimant. In any case, Congress clearly did intend to provide for full compensation for the loss; and, as we have explained above, the courts cannot carry out this

[6] In the Jones Act and FELA cases, even where the injured person has died before the trial the jury may still have to deal with damages for pain and suffering which continued over a period of time, since the administrator may join a claim for pain and suffering of the deceased with his claim for pecuniary loss to the beneficiaries. 45 U.S.C.A. 59, St. Louis, Iron Mtn. Ry. v. Craft, 237 U.S. 648. The computation of interest in such a case might be an undesirably confusing assignment to give to the average jury.

clear mandate without taking into account the inadequacy of delayed compensation.

Moreover, it is apparent that this Court has set no precedent to the contrary. In the Sabine Towing case, *supra*, the Court of Appeals was using its own discretion in denying interest, rather than reversing discretion exercised by the trial court. This was in accord with the idea formerly held that the Courts of Appeals had the power to try admiralty cases de novo. Such a rule no longer obtains. *McAllister v. United States*, 348 U.S. 19.

The judgment is

AFFIRMED.

CAMERON, Circuit Judge, Dissenting:

The record before us does not, in my opinion, sufficiently present the issues of law the court below was bound to consider in reaching its decision to enable us intelligently to pass upon the contentions of the parties. This is so because of the complete failure of the trial court to find the facts and state separately its conclusions of law as required by the Rules of Practice in Admiralty and Maritime Cases.[1] The court below

[1] Rule 46½ provides the following:
"Findings of Fact and Conclusions of Law. In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under Rule 49."

heard the evidence and the arguments on August 4, 1958, and held the case under study until October 17 when it filed its decree, which merely awarded judgment in favor of Mrs. Stiles and against National Airlines "in the full sum of $250,000.00 . . ."

The amount of the award in this case would depend necessarily upon how the court decided several questions of law as to which the parties took sharp issue. In fact, as I understand appellant's contentions, it does not attack the court's exercise of its discretion in fixing the amount of the damages, but only the inclusion of elements of recovery not permitted by law. The extremely large verdict rendered by the trial court could only be justified, as appellant contends, by its finding all of the facts in favor of the widow and concluding all of the question of law in her favor. We are left without any inkling of the court's decision on these points of law. To pass upon its verdict and judgment amounts, therefore, in my opinion, to judging in the dark.

Among the sharply contested issues of law before the trial court was whether appellee was entitled to recover one-half of her husband's prospective earnings as a matter of right.[2] The opinion does not decide this

[2] Appellee thus states her position: "First, the Airline's computations are based only on the cash contributions which Mrs. Stiles actually received from her husband during his lifetime. The Airline takes no account of (a) Mrs. Stiles' community property half interest, in her own right, in all of her husband's earnings, or (b) the fact that Mrs. Stiles as her husband's sole heir, would have inherited the balance of his saved earnings at his natural death."

The majority refers to this question in these words: "Such a contention would deprive the trial court of the right to give any effect to the community property laws of the

question, i.e., whether in a suit under this Federal Statute, which fixes the limits of recovery, the Louisiana State Statute would control or be entitled to consideration; but, from the above quotation, it seems to accept appellee's position with respect to it. The two cases cited in support of the majority's reference to this problem are tax cases. I find no authority in appellee's brief or in the Court's opinion for the application here of the Louisiana Statute. From the oral argument it would be assumed that appellee takes the position that, if the fact-finder concluded that decedent would have averaged net earnings of $50,000 per year for the period of his expectancy, it should automatically award to the widow one-half of that amount by way of damages.

If such be the law, recovery under this federal act by a beneficiary living in Louisiana would vastly exceed recovery by a beneficiary of a person living just across the state line in Mississippi. Such a result contravenes, in my opinion, all of the teachings of the cases, that this series of acts, of which the Federal Employers' Liability Act is one of the first and the one most often encountered, was enacted to insure uniformity of treatment to residents of all of the states unaffected by the different rules applying in the several states.[3]

State of Louisiana which have the effect of declaring that one-half of the husband's current income be'ngs to the wife. See Bender v. Pfaff, 282 U.S. 127; Succession of Wiener, 203 La. 649, 14 So.2d 475."

[3] The general law under F.E.L.A. is thus stated in 35 Am. Jur., Master and Servant, §519, pp. 949-950: "While there has been considerable controversy as to the measure and amount of damages recoverable in an action under the Federal Employers' Liability Act, it is now settled that the measure of damages is to be determined according to the provisions of the Act itself and the general common law

Whether the award to which appellee was entitled was limited to contributions decedent would probably have made to her based upon experience and any probative evidence as to future earnings; whether the amount should include[4] "such accumulation, both as to her one-half under community property rules, and also of his part as well, [which] might ultimately be inherited by the wife;" whether the discount rate should be four per cent, as contended by appellant, in arriving at the present cash value of "the pecuniary loss" the widow sustained by the death of decedent, all present questions of law earnestly argued by both parties and supported in most instances by respectable authority. The trial court was bound to resolve these questions of law and under Admiralty Rules it was required to set down its conclusions and the facts to which it applied them in reaching the result upon which judgment was predicated.

At the hearing covered by the record before us the only issue presented was the amount to be awarded appellee.[5] Damages are commonly fixed by juries and the elements which they are entitled to consider are carefully spelled out in the court's charge. Where damages are awarded by the court, it can, under said Rules, do no less than include in its findings and conclusions the elements of damages upon which the award is based.

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as administered by the federal courts, unaffected by state legislation or the decisions of state courts. This is true in respect both of actions by the employee for his own personal injuries and in actions by the representatives of an employee who is killed or who dies from injuries received, for the benefit of the next of kin designated in the statute."

[5] As the majority seems to think.

The failure of the court below so to do requires, in my opinion, that its judgment be reversed and *a fortiori* requires that we do not put our approval upon it.

Admiralty Rule 46½ made it obligatory upon the court to enter its findings of fact and conclusions of law, and I know of no practice which puts a litigant in default for not submitting requested findings, unless requested by the court to do so.[5] Rule 52(a), F. R. C. P. specifically exempts the parties from any obligation to request findings of fact and conclusions of law, and Professor Moore states, 7 Moore's Federal Practice, 2d Edition, page 4431, that "it has been generally held that such Admiralty Rules should be given the same construction as that given to identical Rules of Civil Procedure."

We recently[6] vacated a judgment and remanded an admiralty case to the district court solely because of its failure to make findings of fact and conclusions of law as required by Rule 46½, quoting from a Supreme Court decision stating "that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

I am unable also to go with the majority on the matter of interest. The authorities it cites are not to me convincing. As far as I am advised, it has always been the law that judgments for unliquidated damages

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[5] The Plough City, 3 Cir., 1941, 122 F.2d 816, 819.

[6] Victory Towing Co., Inc. v. Bordelon, 1955, 219 F.2d 540.

do not carry interest prior to their rendition,[7] and that interest will not be allowed on damages for personal injuries.[8] I find nothing in the majority opinion or in the briefs of counsel to warrant so radical a departure from so well established a principle. If Congress had intended so drastic a change, it would have said so in the statute. *Funkhouser v. Preston*, 290 U.S. 163, 168-169, and *Louisiana and Arkansas Railway Co. v. Pratt*, 5 Cir., 1944, 142 F.2d 847.

For these reasons I respectfully dissent.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, National Airlines, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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[7] 15 Am. Jur., Damages, §161, pp. 579-580.

[8] "The general rule is that interest will not be allowed on damages for personal injuries. Thus, interest is improperly awarded for personal injuries caused by negligence or for personal injuries against a master, where the party causing the injury could not be benefited. . . ." 15 Am. Jur., Damages, §171, pp. 587-588.

Computations of Damages

These computations are based on a discount factor of 3%, which was the conservative interest rate on investments at the time of Mr. Stiles' death, and is the generally approved discount rate for computing personal injury and death damages. *R 30; United States vs Puscedu*, 224 F2d 5 (CA 5-1955).

The first computation is also based on the assumption that Mr. Stiles' expenses attributable to his law-practice income ($17,000 at the time of his death) would have increased in proportion to projected increases in that income.

1—*Projected Annual Law-Practice Income of $70,000* (Annual Earnings of Decedent if he had Lived)

The result of the formula, $\frac{\$17,000}{\$41,800} \times \frac{\quad}{\$70,000}$, is $28,460, which is accordingly the appropriate projective expense figure to be deducted from the income-projection figure.

$70,000 minus $28,460 leaves $41,540—Mr. Stiles' projected annual net law-practice income after deduction of all allocable business and personal expenses. This is the sum per annum of which Mrs. Stiles has been deprived by her husband's death.

$41,540 multiplied by $14.99 (the present value of one dollar per year for 20.2 years*—Mr. Stiles' life expectancy—discounted at 3% per annum) gives $622,685.

2—*Projected Annual Law-Practice Income of $41,800*
(Annual Earnings Prior to Death)

$41,800 minus $17,000 of allocable expenses leaves $24,800. This figure multiplied by $14.99 gives $347,200.

* *R 51-52.*